Nos. 117, 118, 119, 332, 333, 334

In the Supreme Court of the United States

OCTOBER TERM, 1955

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, APPELLANT

v.

UNION PACIFIC RAILROAD COMPANY ET AL.

UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SECRETARY OF AGRICULTURE, APPELLANTS

v.

UNION PACIFIC RAILROAD COMPANY ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

WASHINGTON PUBLIC SERVICE COMMISSION ET AL., APPELLANTS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY ET AL.

UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY ET AL.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, AND THE SECRETARY OF AGRICULTURE

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No. 118

UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 119

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SECRETARY OF AGRICULTURE, APPELLANTS

v.

UNION PACIFIC RAILROAD COMPANY ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION ET AL., APPELLANTS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY ET AL.

No. 333

UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY ET AL.

No. 334

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY ET AL.

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[1] The Secretary is a party only to Nos. 332, 333, 334. The issue decided in those cases is briefed under Point II *infra*, pp. 75–88.

OPINIONS BELOW

The report of the Interstate Commerce Commission (Neb. R. 25; Col. R. 59; R. II, 1518)[2] appears at 287 I. C. C. 611. The majority and dissenting opinions of the Nebraska district court in Nos. 117, 118, 119 (Neb. R. 153, 169) are reported at 132 F. Supp. 72. The *per curiam* opinion of the Colorado district court in Nos. 332, 333, 334 (Col. R. 280) is reported at 131 F. Supp. 372.

JURISDICTION

The final judgment of the Nebraska three-judge district court was entered on December 20, 1954 (Neb. R. 210). Separate notices of appeal were filed in that court by appellants on February 17 and 18, 1955 (Neb. R. 226, 229, 230).

The final judgment of the Colorado three-judge district court was entered on February 1, 1955 (Col. R. 361), and a timely motion for new trial or reargument and reconsideration was denied on April 22, 1955 (Col. R. 362). Separate notices of appeal were filed in that court by

[2] The record in this case consists of four volumes. One volume contains the record of proceedings before the Nebraska district court, and references to that record will appear as Neb. R. ——. There is a similar volume covering the proceedings before the Colorado district court, and references to it will appear as Col. R. ——. Two additional volumes contain the record of procedings before the Commission—a record which was put into evidence in both the Nebraska and the Colorado cases. References to these volumes will appear as R. I, ——, and R. II, ——.

appellants on June 20, 1955 (Col. R. 364, 365, 369).

The jurisdiction of this Court rests on 28 U. S. C. 1253 and 2101 (b). Probable jurisdiction of the cases was noted on October 24, 1955, and they were consolidated for oral argument (Neb. R. 245; Col. R. 374).

QUESTIONS PRESENTED

1. Whether the Colorado district court, in setting aside the Commission's order establishing new through routes (and joint rates) for specified commodities on the ground that the "uncontradicted evidence" showed that through routes were already in existence, applied an erroneous standard for determining the existence of through routes and improperly set aside the Commission's finding that such routes did not exist.

2. Whether, in narrowing the Commission's order, the Nebraska district court failed to give proper effect to the provisions of Section 15 (4) and to the Commission's finding thereunder that the establishment of the prescribed through routes was "necessary and desirable" from the standpoint of providing "adequate and more economic transportation" for shippers who could not otherwise participate effectively in the effi-

cient marketing of perishable agricultural commodities.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 *et seq.*, are set forth in the Appendix, *infra*, pages 90–94.

STATEMENT

The general nature of the administrative proceedings

On August 1, 1949, the Denver & Rio Grande Western Railroad Company (referred to as the Rio Grande) filed with the Commission a complaint requesting that the Union Pacific Railroad Company (which, with its leased lines, is referred to as the Union Pacific) be required to establish just, reasonable and non-discriminatory and competitive joint rates with the Rio Grande on freight traffic

(a) between points on or via the Union Pacific in Utah north of Ogden, Idaho,

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[3] The Government's jurisdictional statement in the Nebraska case also raised the following additional question:

"Whether Section 3 (1), prohibiting any carrier from giving any undue preference to any person, locality, etc., or subjecting any person, locality, etc., to any undue prejudice, may apply to the situation where the persons or localities receiving preference are served by one carrier and those prejudiced are served by another."

Further analysis of the case convinces us (see p. 82, n. 20, *infra*) that this Court's determination as to the correctness of the Nebraska court's decision on the issue stated in question 2 above will be dispositive of Nos. 117, 118, and 119.

Montana, Oregon, Washington and British Columbia, and Colorado common points and points east thereof,

(b) between Utah common points on the one hand, and places on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia on the other hand.

The Rio Grande's complaint named as additional defendants numerous other railroads with which (or with some of which) the Union Pacific maintains through routes and joint rates.

In its complaint, the Rio Grande contended that through routes already exist for the freight traffic involved. Therefore, it urged that the failure of the Union Pacific to establish competitive joint rates for the traffic in question, when moved on through routes in which the Rio Grande participates, violates Sections 1 (4), 3, and 15 (1) and (3) of the Interstate Commerce Act.

Numerous parties intervened in the Commission proceedings in behalf of the complainant, including the Secretary of Agriculture of the United States, the Public Utilities Commissions of Colorado and Utah, the American National Live Stock Association, other live stock and stock feeder associations, various shippers' and producers' associations, milling companies, farm bureaus, chambers of commerce, groups of employees of the Rio Grande, and the American Short Line Railroad Association. Interveners in

opposition to the complaint of the Rio Grande and supporting the Union Pacific and other defendants include the State of Nebraska, the City of Cheyenne, Wyo., the Public Service Commissions of Montana, Washington, Oregon, Wyoming, Nebraska and Kansas, Chambers of Commerce and other associations, certain industrial employee groups in Wyoming, and employee groups of the Union Pacific, the Chicago & Northwestern Railway, and the Wabash Railroad.

In late 1949 and early 1950, extensive hearings were held before a hearing examiner in Salt Lake City, Boise, and Cheyenne. Following an examiner's report, the filing of exceptions and oral argument before the full Commission, the full Commission issued the report and order challenged in these cases. In brief, the Commission held that through routes did not exist over the Rio Grande for the freight traffic in question, but that through routes should be established for specified commodities pursuant to Section 15 (4) of the Act; and that for such commodities, moving in carloads on such through routes, rates not in excess of the joint rates maintained on such commodities on the competitive Union Pacific routes should be established. The Commission also found that the maintenance by the Union Pacific of joint rates to certain points on the Bamberger Railroad, while refusing to participate in joint rates to the same points

on the Rio Grande, subjected the Rio Grande to discrimination in violation of Section 3 (4) of the Act. It ordered elimination of this discrimination. (Neb. R. 26–74.)

The geographical and historical background

The historical, geographic, and traffic background of these cases is set forth in detail in the Commission's report (Neb. R. 34–48). Accordingly, it will be summarized very briefly here.[*]

The Rio Grande operates between Ogden, Utah (its northwestern terminus) and Denver, Colorado, over two routes. By way of the Moffat tunnel the distance is 607 miles, while the route via Pueblo is 782 miles. These are the Rio Grande's main lines. Its eastern connections are the Union Pacific and other railroads with which it connects at Denver, Colorado Springs, Pueblo, Walsenberg and Trinidad. Denver, Colorado Springs and Pueblo are sometimes referred to in this case as the Colorado common points because they are served both by Rio Grande and by Union Pacific or other railroads with which the Union Pacific maintains joint rates.

Western connections of the Rio Grande are in Utah at Ogden, Salt Lake City, and Provo. At Ogden, the connecting lines are the Union Pacific and the Southern Pacific. At Salt Lake City,

[*] A convenient map is appended to the opening brief filed by the Rio Grande (p. 133).

37 miles south of Ogden, the connections are the Western Pacific and the Los Angeles line of the Union Pacific. At Provo, 44 miles south of Salt Lake City, it again connects with the Union Pacific's Los Angeles line. Salt Lake City and Provo are sometimes referred to as the Utah common points since they are served by both the Rio Grande and the Union Pacific.

The Union Pacific runs west from Omaha to Julesburg in northeastern Colorado. At Julesburg, a line runs southwest to Denver, while the main line goes west through Cheyenne (from which another Union Pacific line runs south to Denver) to Ogden. At Ogden, the Union Pacific's main line connects with the Southern Pacific and the Rio Grande. A Union Pacific line running north from Ogden serves points in Utah north of Ogden and (with its connecting lines) Idaho, Montana, Oregon, Washington, and British Columbia. This last described area is referred to as the excluded area.

The Rio Grande generally participates in through routes and joint rates on transcontinental traffic. However, joint rates do not apply to movements over the Rio Grande between the excluded territory and the Colorado common points and points east. Similarly, with some exceptions, joint rates do not apply to freight traffic moving between the excluded territory and Utah common points south of Ogden. However, such traffic

moves on joint rates over the lines of the Union Pacific and other railroads with which it maintains joint rates. In the absence of joint rates on Rio Grande routes for such excluded-territory traffic, such traffic can be routed over the Rio Grande only at combination rates which are considerably higher than the joint rates which are available on the competitive Union Pacific route via Cheyenne.

The findings and the evidence

1. As to the existence or non-existence of through routes

The Commission found (Neb. R. 33) that

> there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic here concerned, and that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation.

In 1897, Union Pacific and its controlled lines, the Oregon Short Line Railroad and the Oregon-Washington Railroad and Navigation Company, were in separate receiverships. In that year, the last-named companies established with the Rio Grande, to and from points in the excluded terri-

tory via the Ogden gateway, joint rates equal to the rates then in effect on the line of the Union Pacific through Cheyenne (R. I, 86–88). These joint rates with the Rio Grande via Ogden remained in effect until they were cancelled progressively by the Union Pacific in 1906 and 1912.

Union Pacific has never purported, by formal action, to cancel through routes with the Rio Grande via Ogden. The Assistant Freight Traffic Manager of Union Pacific testified (R. I, 799–800) that:

> The Interstate Commerce Act gives all shippers the right to specify the lines over which their shipments shall move so the Ogden gateway and route via the Rio Grande is actually available today on traffic to or from points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon and Washington. However, most of that traffic originates or terminates at points on the Union Pacific, and it ordinarily moves via the Union Pacific through Wyoming because the joint through rates to and from that territory are restricted so that they will not apply when traffic is interchanged with the Rio Grande at junction points in Utah.[5]

The establishment of the through routes sought by Rio Grande would require Union Pacific to short haul itself within the meaning of Section

[5] See a similar statement by Union Pacific's counsel during the oral argument before the Commission (R. II, 1621).

15 (4) of the Interstate Commerce Act (R. I, 587,°800). No evidence was presented to show that in recent years Union Pacific or any of the other defendant railroads have solicited traffic from and to the areas here concerned for routing over a Rio Grande route on which higher combination rates apply. Rather, it is undisputed that for many years it has been the policy of Union Pacific "to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic" (Neb. R. 32.)..

There was evidence that scattered shipments on through bills of lading are made to and from the excluded territory over the Rio Grande through the Ogden gateway. Exhibit 1, p. 4 (discussed in detail at R. I, 70–76) shows that in 1948, a representative year, 37 carload shipments were made on through bills of lading from origins in Utah, Idaho, Oregon, and Washington to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific, except three which originated on its connections in Oregon or Washington. Twenty-three moved to Salt Lake City (via Ogden), Provo, Midvale, Murray, and Springville, Utah, and 14 to Denver, Louviers, Pueblo, and Trinidad, Colo., on the complainant's line from Denver to Trinidad. The commodities shipped were canned goods, canned salmon, machinery, contractors' equipment, paper bags, lum-

ber, wallboard, flour, roofing, acid, newsprint, and sheep. The shipments of canned goods and canned salmon, 10 in number, were stopped at intermediate points on the Rio Grande for partial unloading. The 37 shipments moved from or to separate points, except that 2 carloads of canned salmon moved from Seattle, Wash., to Provo, 2 carloads of acid from Dupont, Wash., to Louviers, 2 carloads of canned goods from Logan, Utah, to Denver, 2 carloads of sheep from Bellevue, Idaho, to Pueblo, 3 carloads of lumber from McCall, Idaho, to Salt Lake City, 3 carloads of canned goods from Logan to Pueblo, and 6 carloads of lumber from Emmett, Idaho, to Midvale. It should be noted that all of these shipments were destined to points common to the Rio Grande and the Union Pacific in Utah or Colorado. There was no evidence that any of these shipments moved from the excluded area over the Union Pacific and the Rio Grande via the Ogden gateway to any destination east of the Colorado common points (*i. e.*, points on the north-south line of the Rio Grande between Denver and Trinidad, Colorado).

There was also evidence (R. I, 75) that in 1948 there were 18 carload shipments moved on through bills of lading from points in Illinois, Indiana, Michigan, Ohio, Pennsylvania, New Jersey, Arkansas, and Texas over connecting lines and the Rio Grande to Salt Lake City or Ogden, and

thence by the Union Pacific to destinations in Utah, Idaho, Montana, Oregon, and Washington. These shipments consisted of tractors, dessert preparations, furniture, canned goods, agricultural implements, soap, cattle, castings, feed, rubber, cottonseed, hull bran, and tile. The shipments of tractors, dessert preparations, furniture, canned goods, agricultural implements, and feed were stopped at intermediate points on the Rio Grande or the Union Pacific, or both, for partial unloading. Two of the shipments destined to Idaho points were delivered at Salt Lake City and trucked to destination so as to avoid paying the applicable combination rates.

However, the evidence strongly suggests that the above shipments via the Rio Grande and at the higher combination rates may have resulted, at least in substantial part, from shippers' ignorance or inadvertence. Thus, the Rio Grande's vice president in charge of traffic (R. I, 66) noted that "competitive through rates on traffic originating at Missouri River or east thereof and destined to the Union Pacific's closed door territory north of Ogden [via the Rio Grande] do not apply via Pueblo, Colorado, with a population of seventy-five thousand, over any route or combination of routes. This fact is overlooked from time to time by certain shippers who bill cars to unload at Pueblo, which results in higher charges at combination rates." (R. I, 72–

73.) Similarly, the manager of a cold storage plant in Pueblo testified that the plant received farm products from the excluded territory north of Ogden via the Rio Grande "only when a misrouting occurs" (R. I, 304).

Also in 1948, 22 carload shipments moving on through bills of lading from various origins east of the Rocky Mountains to destinations in Idaho, Oregon, and Washington, which were routed over the Rio Grande and the Union Pacific, were held by the Rio Grande at Denver or Pueblo for correction of the routing because the joint through rates were not applicable over that road via the Ogden gateway (R. I, 75–76). Referring to all of the above figures as to eastbound and westbound shipments via Rio Grande in 1948, Rio Grande's vice president in charge of traffic stated that they "reveal that many shippers, large and small, and many railroads, assume a through route exists at competitive freight rates via Rio Grande-Ogden-Union Pacific on westbound traffic, and via Union Pacific-Ogden-Rio Grande on eastbound traffic" (R. I, 76).

In addition to this evidence of isolated commercial shipments, it was also shown that, pursuant to service orders issued by the Commission and in effect during World War II, a substantial number of freight shipments were diverted by the Rio Grande from through routes in which it regularly participates to the routes via Ogden to the

excluded territory. For example, under Interstate Commerce Commission Service Order No. 98, effective November 2, 1942, and cancelled August 17, 1945, the Rio Grande diverted to the Union Pacific at Ogden and Salt Lake City, 8,491 carloads destined to points in Oregon and Washington via the Southern Pacific (R. I, 70).

Also, during World War II, special combination trains of troops in passenger cars and military supplies in freight cars from eastern and southern origins to destinations in the northwest (excluded) area were initially routed and moved over the Rio Grande via Ogden and the Union Pacific (R. I, 71). The rates and charges for these freight movements were not filed with the Commission, but were adjusted under Section 22 of the Act on the basis of the joint rates applicable over the Union Pacific route through Wyoming (R. I, 71).

In February 1949, when the main line of the Union Pacific in Wyoming was blocked by snowstorms, a substantial amount of traffic was diverted from the Union Pacific to the route of the Rio Grande between Denver and its junctions with the Union Pacific in Utah (*e. g.*, Ogden, Salt Lake City) (R. I, 72).

The Commission concluded that neither the scattered commercial shipments in the typical year 1948, nor the shipments routed or diverted over the Rio Grande under wartime or emer-

gency conditions, established that through routes over the Rio Grande on traffic originating in or destined to the excluded territory already existed. As to the wartime and emergency routings and diversions, the Commission stated that "[t]hey show only that the Rio Grande routes were physically practicable, and have no bearing upon the issue of whether or not those routes constitute 'through routes' within the meaning of that term as used in the act." (Neb. R. 32).

Turning to the scattered commercial shipments in the typical year 1948, the Commission concluded as follows (*ibid.*):

> * * * so far as this record shows, "the carriers' course of business" has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic. That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads east-bound, none to destinations east of Colorado common points, and 18 carloads west-bound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the

same points at the joint rates over the Union Pacific routes, the details of which appear later in this report.

Referring to all of the shipments via the Rio Grande which have been described above, the Commission stated that "all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the same category as the [single] shipment held insufficient to show the existence of a through route in *Beaman Elevator Co.* v. *Chicago & N. W. Ry. Co.* [155 I. C. C. 313], cited with approval by the Supreme Court in *Thompson* v. *United States* [343 U. S. 549]" (Neb. R. 32–33).

2. As to the need for establishing through routes for particular commodities.

Having found that through routes did not exist over the Rio Grande for the traffic in question, the Commission next considered whether through routes and joint rates should be established over the Rio Grande pursuant to Section 15 (3) and (4).

It is undisputed that requiring the Union Pacific to establish through routes with the Rio Grande on traffic between the excluded territory, on the one hand, and the Utah common points, the Colorado common points, and points east of the Colorado common points, on the other hand, would compel the Union Pacific to short haul itself. Under Section 15 (4), the Commission cannot require a carrier to short haul itself

"unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation."

Such a determination was made, the Commission concluding (Neb. R. 73):

> That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations

in the Lower Peninsula of Michigan and in Oklahoma and Texas.

The subsidiary findings of the Commission as to the needs of shippers for through routes over the Rio Grande, and the evidence supporting those findings, are summarized below.

Livestock. The Commission's principal findings as to the needs of shippers or consignees of livestock originating in the excluded territory may be stated as follows (Neb. R. 52–54):

In the areas in Utah and Colorado served by the Rio Grande, there are good pasture lands for grazing livestock. In addition to stock produced locally in those areas, substantial quantities are shipped in the summer season from other sections in Colorado, Utah, and surrounding states both for feeding in feed lots and pastures and for grazing on the livestock ranges. There is a large movement of livestock into and out of Colorado. Raisers of livestock and operators engaged in fattening livestock, who are served only by the Rio Grande, generally buy from areas from which joint rates apply in connection with that road in order to obtain the benefit of grazing or feeding in transit and of reshipping the fattened animals to Denver or markets east of Denver on the balance of the joint rate. Such operators must absorb the difference in the transportation costs, and are not able to purchase livestock economically in the northwest area in competition

with buyers from Iowa, Wyoming, Nebraska, Colorado and Kansas who have the benefit of competitive joint rates from the excluded territory over the Union Pacific routes (Neb. R. 52).

As a result of the curtailment of the use of grazing lands in national forests in Colorado, livestock raisers in that state have switched from raising livestock to fattening such stock by grazing in private pastures. They obtain some of this stock from the northwest areas, particularly Idaho, Montana and Oregon (Neb. R. 52–53).

On sheep and goats to destinations west of the Missouri River, including Colorado common points, and on cattle to the Colorado common points and east thereof, via Ogden and the Rio Grande, the rates are on a combination basis, and feeders of livestock located on the Union Pacific in northern Colorado and Nebraska are now able to overbid the Arkansas Valley (S. E. Colorado) feeders on northwest stock when destined to the Missouri River and east thereof (Neb. R. 53–54).

Illustrative evidence in support of the Commission's findings as to livestock is as follows:

The superintendent of livestock operations of the Holly Sugar Corp., Denver, Colo., testified that this company has sugar factories on the Rio Grande in Colorado, including one at Delta, about 35 miles southeast of Grand Junction, and that in a normal year of beet sugar production it has available for feeding at this point from 25 to

60 thousand tons of beet pulp, as well as several thousand tons of molasses. The livestock pens where the animals are fed are adjacent to the sugar factory. This concern also has other factories at Swink, Colo., and points in Montana and Wyoming. It buys livestock in most of the western states and feeds annually from 10 to 12 thousand head of cattle and from 50 to 60 thousand lambs (R. I, 269–272). It purchases livestock on the Union Pacific in Idaho and Montana but cannot move them to Delta for feeding-in-transit at through competitive rates (R. I, 273). The livestock produced in the Northwest, particularly in Idaho and western Montana on the Union Pacific, is of excellent grade for use in feeder operations on the Rio Grande and elsewhere. No livestock has been shipped to Delta because of the application of the higher combination of rates from western Montana. The Union Pacific does not publish, in connection with the Rio Grande, joint through rates from the Northwest to eastern livestock markets on as low a basis as those available to livestock feeders on the Union Pacific, *e. g.*, in Wyoming and Nebraska. This has hindered the feeder operations of the Holly Sugar Corp., as well as other feeders and dealers on the Rio Grande, and favors the operations of livestock dealers and feeders on the Union Pacific (R. I, 274, 277–282).

The chief rate clerk of the traffic department of the Holly Sugar Corp. testified that the rates

on cattle from points in Montana and Idaho to Denver are 31 to 35 cents higher per 100 pounds when routed over the Union Pacific-Rio Grande than they are when routed over the Union Pacific (R. I, 288); that on sheep from these points to Omaha, Kansas City, and Chicago, the rates via the Union Pacific-Rio Grande-Union Pacific are 19 cents per 100 pounds higher than via Union Pacific direct from and to the same points (R. I, 288); that on cattle to Omaha via the Union Pacific-Rio Grande the rates are from 35 cents (from Divide, Montana) to 33 cents (from Idaho Falls) higher than the Union Pacific rates direct; that on cattle to Kansas City the rates via Union Pacific-Rio Grande are 45 cents to 33 cents higher than over the Union Pacific direct from the same two origins, while to Chicago the difference ranges from 57 cents (from Divide) to 33 cents (from Rogerson, Idaho) (R. I, 397).

The general manager of the Producers' Livestock Marketing Association, a marketing association of livestock producers which operates in 14 western states, testified that the association handled about 30,000 carloads of livestock in 1948. Livestock, he stated, is grazed and fed along the Rio Grande between Ogden and Denver (R. I, 310–311). Although a large part of this livestock is produced locally, a substantial amount is shipped in from other nearby areas both for feeding in feed lots and pastures and for summer

range grazing. Most of the sheep brought into the feeding and grazing area come from the Northwest—Idaho, Oregon, Montana, and Washington (R. I, 312). Livestock moving from the feeding and grazing areas via the Rio Grande goes both east and west to slaughter pens and feed yards and pastures, and sells in competition with stock from points on the Union Pacific north of the Rio Grande lines (R. I, 313). Pasturing of livestock on wheat in the wheat-raising states is a growing practice, and wheat pastures of Kansas, for example, offer an important outlet for sheep and lambs from points on the Rio Grande. Billing at joint rates with feed-in-transit is less than the cost of shipments at combination rates. The witness further testified that there is a 19-cent arbitrary on the movement of livestock over the Rio Grande from Ogden on shipments originating on the Union Pacific, and that this reduces the net returns of growers and feeders. The opening of the Ogden gateway to the Rio Grande would have the effect of lowering the rates and increasing the service (R. I, 314–315). See discussion of this arbitrary in the Commission's report (Neb. R. 55).

A livestock operator at Heber, Utah, which is served only by the Rio Grande, testified that he is engaged principally in raising sheep in an extensive livestock area (R. I, 324). This area produces "an extraordinarily good fat lamb."

Some of these lambs are sold for feeding in such midwestern states as Kansas, Iowa and Nebraska. Growers in his area bring in most of their replacements of breeding stock from such states as Idaho and Montana (R. I, 325). The ewes and lambs are brought in from Idaho and Montana under a billing which permits feeding in transit and which is used again in sending the lambs to the market. The arbitrary of 19 cents, applicable on such feeding-in-transit movements via Union Pacific-Rio Grande through Heber to market, means that the returns to the Utah producer would be that much less than the returns to the producer located on the Union Pacific. If such feeder lambs were shipped from the Heber area to Kansas wheat pastures, higher combination rates would apply (R. I, 326–327).

The president and general manager of the Benton Land & Livestock Co., Burns, Colorado, owning 16,000 acres of land and leasing about 30,000 additional acres in Western Colorado, testified that his company does not breed cattle but buys them wherever possible for fattening on its land adjacent to the lines of the Rio Grande. The fattened stock are then shipped to markets, with about 90 percent going to New York (R. I, 331–332). The "opening of the Ogden gateway" would be advantageous to this company in that it would permit it to purchase young livestock in Idaho, Oregon, Washington

and Montana and ship it on joint rates with feeding in transit in Colorado (R. I, 432–433). The company endeavors to buy cattle that can be reshipped at joint rates after feeding in transit. The company has found that because of the lack of through rates on livestock from the Northwest area via the Rio Grande to eastern markets, it cannot compete in buying cattle in that area against buyers from other areas (such as points on the Union Pacific) who enjoy such joint rates, unless it is prepared to absorb the difference between joint and combination rates (R. I, 334, 342–344). Because of the gradual reduction in grazing areas of the national forests, grazers in his territory are changing from breeding operations to feeding operations and are forced to buy livestock for feeding (R. I, 342–344). The opening of the Ogden gateway would give such operators in Colorado and Utah an opportunity to purchase young stock from the Northwest area at a competitive cost (R. I, 341).

The secretary of the Colorado Cattlemen's Assn., Denver, Colo., testified that this association has 5,000 members composed of livestock dealers, feeders and operators who raise cattle and who purchase and market animals requiring feeding in transit. A majority of the big operators in the association go out of Colorado to buy at least a portion of the cattle which they feed. After feeding, the cattle are sold principally through Denver

and Chicago and other eastern markets. Members of the association find it difficult to purchase cattle in the Northwest on a competitive basis for feeding in transit in Colorado because they lack joint rates on which they can reship to eastern markets (R. I, 345–347). The members of the association are interested in having the Ogden gateway opened as they want to buy young stock on a competitive basis for feeding-in-transit (R. I, 349).

The owner of a large ranching and livestock business in Utah and Colorado testified that he purchases breeding stock in the northwest area which he brings into his ranges in Utah and Colorado. In the fall of the year, after feeding on Utah and Colorado ranges, he reships them either to markets in Kansas City, St. Joseph, or to his pasture areas in western Kansas. In the absence of joint rates, such as are available to growers located on the Union Pacific, he must pay "about a 19-cent or 20-cent penalty" on such movements (R. I, 374–375).

An official of the Lincoln Packing Division of the American Stores, Inc., which has cold-storage plants and stores throughout the country, testified that this concern has a storage plant at Pueblo, Colo., on the Rio Grande, with a storage capacity of between 200 and 250 carloads (R. I, 412). This concern engages in storage operations and in the slaughter of livestock. It receives at its

Pueblo plant shipments of lambs which originate in Idaho and Oregon on the Union Pacific. When these shipments move over the Union Pacific via Ogden and the Rio Grande, combination rates are applied, resulting in charges of $70 to $80 more per car than if moved at joint rates applicable via the Union Pacific through Denver. Despite the higher rates via the Rio Grande, the company uses the Rio Grande route because shipments move more expeditiously and suffer less shrinkage. The greater shrinkage on the Union Pacific results from the necessity of stopping cars for feeding in transit at Denver, a necessity which does not exist on the Rio Grande route (R. I, 413–415).

Agricultural commodities. The Commission's findings as to the necessity for through routes and joint rates over the Rio Grande for agricultural commodities (excluding livestock) moving out of the excluded northwest territory, fall into two categories. That is, the Commission found that producers and shippers of such commodities in the excluded territory, and processors and dealers of such commodities who are served only by the Rio Grande, both need such through routes, though partly for different reasons.

(a) *Growers and shippers in the excluded territory need through routes and joint rates via the Rio Grande in order to exercise reconsignment*

privileges effectively. The Commission found (Neb. R. 56–57):

> Growers of wheat, potatoes, onions, peas, other vegetables, and fresh fruits at Idaho Falls, Burley, Twin Falls, Blackfoot, Aberdeen, Caldwell, and Parma on the Union Pacific, and also those engaged at such points in buying, selling, packing, and distributing vegetables and fresh fruits, market such products throughout the United States. In order to get as wide a distribution as possible those growers and other growers in the northwest area need as many markets and outlets as possible.
>
> In marketing the large production of such products, particularly Idaho potatoes, it is the general practice to divert carloads in transit as markets are found and sales are made. Routes over which joint through rates apply are generally used so that a shipment can be diverted or reconsigned without the application of a combination of rates. If a shipment reaches a point through which a combination of rates applies and the sale is lost, it is frequently necessary to dispose of the shipment at that point at a forced or distress price. Such points are called closed or pocket markets.
>
> The principal outlets for Idaho fruits and vegetables vary from year to year, but large markets are in the Central, Southwestern, and Southeastern States. Carloads moved over the Union Pacific to the

> Central States can be diverted to the Southeastern States at the joint through rates if they move east through Omaha, Kansas City, St. Louis, or Chicago, but if the cars are routed to points in the Southwest over the Union Pacific and connections through Denver they cannot be diverted to southeastern markets east of New Orleans at joint through rates. The southwestern markets are pocket markets in that respect. Idaho producers are in competition with shippers in other producing areas and find it difficult to compete on shipments routed over the Rio Grande via Ogden or Salt Lake City. * * *

The importance of reconsignment privileges to shippers of agricultural commodities, and the fact that such reconsignment privileges can be exercised only along routes on which joint rates apply, were illustrated by the following testimony:[6]

The owner of a thousand-acre farm in Idaho is engaged in raising and shipping fresh fruits and vegetables, green peas, lettuce, potatoes, onions, prunes and peaches (R. I., 420). In his business, it is necessary to ship many carloads of produce before they are sold and to sell them "while rolling or in transit." His most important markets are Chicago, Kansas City, St.

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[6] For a further illustration of the significance of diversion or reconsignment privileges, see *Southeastern Vegetable Case*, 200 I. C. C. 273, 278-279.

Louis, the Midwest, and the Southwest, although some cars go to New York. In shipping, he has had many experiences with "distressed cars," which are carload shipments which arrive at points where they can be reconsigned only at higher combination rates. Such points are known as pocket markets (R. I, 421–424). If he could use joint through routes and rates over the Rio Grande, the so-called "pocket markets" could be avoided (R. I, 425–427). He does not think that the opening of the Ogden gateway would reduce the tonnage of the Union Pacific, but, rather, that it would open the "pocket markets" to Idaho products, increasing their consumption by as much as would be diverted away from the Union Pacific (R. I, 427-428).

The vice president and general manager of another large concern, J. C. Watson Co. of Parma, Idaho, testified that his company is engaged in producing, packing, and distributing fresh fruits and vegetables, and ships from 1,500 to 2,000 carloads annually to markets throughout the United States; that it is constantly seeking new markets and supports the Rio Grande's application because joint rates through the Ogden gateway via the Rio Grande would provide a free flow of fruits and vegetables from Idaho to all markets, especially into southwestern territory (R. I, 432–433). He further testified that shipments of fruits and vegetables from Idaho fre-

quently encounter market areas which are called "pocket markets." Thus, shipments reaching points in Kansas not served by the Union Pacific, *e. g.*, Wichita or Hutchinson, cannot be reconsigned, under prevailing rate restrictions, to Kansas City or points east if, for any reason, they are rejected or if the price proves unsatisfactory (R. I, 433). The witness gave examples of the difficulties encountered and the additional expenses incurred when shipments arrive at "pocket markets" (R. I, 434–435).

A member of the executive committee of the Idaho State Grange, a statewide organization consisting of 12,000 members who are farmers, shippers, growers, and dealers in potatoes and grain, testified that it would be to the best interest of Idaho as an agricultural state to have the Ogden gateway opened (R. I, 262–263). Competitive through rates via Ogden and the Rio Grande to markets not now open to producers of that state would be beneficial (R. I, 267).

Moreover, the needs of shippers of agricultural products in the excluded territory for joint rates at which they can reconsign shipments is not limited to reconsignment while shipments are on the Rio Grande routes. Thus, an Idaho shipper testified that he can ship potatoes on joint rates via the Union Pacific and Denver to such points in the southwestern states as Tulsa, Oklahoma City and Fort Worth. However, if he desires to

reconsign the shipment from such a point to a point in the southeastern states, he must pay a higher combination rate. He cannot ship into the southeastern states at joint rates unless he uses the Union Pacific as far as Kansas City. Because of this limitation on reconsignment at joint rates from southwestern to southeastern points, he avoids the risks of "pocket markets" by largely refraining from shipping to points in the southwest (R. I, 292–302).

Other witnesses engaged in producing and shipping potatoes and other vegetables testified as to the need for competitive joint through rates via Ogden and the Rio Grande to enable them to exercise reconsignment privileges effectively (R. I, 252, 292–294; 303–304; 438–440; 467–468; 472).

(b) *Processing and marketing facilities on the Rio Grande are cut off from producers and shippers of agricultural products in the excluded territory.* The Commission found (Neb. R. 69–70) that

> * * * A complex but efficient marketing system has been evolved to provide as orderly a distribution of food commodities as possible. Adequate transportation facilities and services are required for the proper functioning of the system. Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be

moved to market with expedition and care, and over as many routes as possible, * * * A number of services, not only at origin and destination, but en route, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities. * * *

* * * The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities. This conclusion is also supported and emphasized by the situation with respect to the operation of many of the in-transit privileges and services which are generally accorded such traffic and are necessary for its efficient marketing. For instance, on this traffic reconsigned or accorded transit privileges, such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply. * * *

For example, Skyland Food Corporation operates a frozen food plant at Delta, Colorado, engaging principally in the processing of fruit. The capacity of the plant is 15,000,000 pounds annually and it is operated at about 50 percent of its capacity. While Idaho fruit is desirable, it cannot be used for processing at Delta be-

cause of the lack of joint rates from Idaho via the Rio Grande. If through rates via Ogden and the Rio Grande were available, it could obtain fruits in the Brigham, Utah, area, north of Ogden for processing in transit, and could use apples of "C" grade from Idaho, amounting to several thousand tons annually. (R. 140–149).

The Mountain Ice & Coal Co. operates a cold storage plant at Pueblo, Colo., with a capacity of 74 cars. The principal perishables stored at this plant are apples, frozen foods, butter, eggs, frozen poultry, onions and potatoes. It would be able to store frozen foods from Oregon and Washington, which originate on the Union Pacific lines, if the Ogden gateway were opened by joint rates. Storage customers desire access to as many markets as possible, but the combination rates now in effect limit the flow of Northwest territory products through Pueblo (R. I, 303). While the company can receive shipments via the Union Pacific and Denver, the necessity for a backhaul to Denver means that it can sell in Denver, after in-transit processing, only if it can receive shipments on joint rates via Ogden and the Rio Grande (R. I, 307–308).

A shipper of dried beans at Colorado Springs handles beans originating in California, Wyoming, Idaho, Colorado, and New Mexico. His principal market is in the southeastern section of the United States. He buys beans in Idaho which

he can process in transit at his warehouses, provided the eventual destination is not east of the Missouri River. He is interested in processing Idaho beans in Colorado Springs, but does not do so because most of his markets are east of the Missouri River. (R. I, 406). He stated that he had lost business in many instances because he could not furnish Idaho Red beans and Idaho Great Northern beans in his assorted cars from Colorado Springs (R. I, 407). However, if he purchased Idaho Red beans or the Great Northern beans in Idaho and brought them through Colorado Springs via the Ogden gateway and Rio Grande, he would pay a 39-cent higher rate than via the Union Pacific and Denver (R. I, 408).

A witness testifying for the United States Department of Agriculture, supporting the application of the Rio Grande, stated that it is the position of that Department that the opening of the Ogden gateway route will promote distribution; that the continued inability of shippers to use the Ogden gateway at joint through rates is not in the interest of the general agricultural public (R. I, 1069–1073); that the Department is opposed to the existing routing restrictions on agricultural commodities and is of the view that the small amount of tonnage the Union Pacific would lose if the Ogden gateway were opened commercially would do no substantial harm to that carrier (R. I, 1080–1081).

Granite and Marble Monuments—Westbound: The only westbound commodity, with respect to which the Commission found that through routes and joint rates via the Union Pacific-Rio Grande routes were justified under Section 15 (4), was granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory.

The Commission made the following finding (Neb. R. 52) as to this commodity:

> There is * * * an urgent need for the establishment of joint through rates on [monuments] to destinations in the excluded territory with stop-off privileges at intermediate points on the Rio Grande. A substantial portion of this traffic has been lost to the trucks, chiefly because of rate differences and the lack of stop-off privileges on the Rio Grande at competitive through rates.

The testimony supporting this finding is as follows:

A fabricator and wholesale dealer in granite and marble monuments at Brigham City, Utah, testified that he purchases marble from Georgia and granite from Wisconsin, Vermont, and Minnesota; that he sells in Colorado, Utah, Idaho, Wyoming, Montana, Oregon, and Washington, and would be benefited by joint through rates with transit stopover arrangements on the Rio Grande; that he has dealers in Colorado on the Rio Grande

and with no joint through rates over that road he is "penalized" in getting a car into Northern Utah, Idaho, Montana and portions of Oregon over the Union Pacific (R. I, 388–389). To dealers in the Northwest, he can ship through Rock Springs over the Union Pacific into Ogden, but if he routed cars over the Rio Grande he would lose on the car when it reached the Northwest. He has a dealer at Grand Junction, Colo., and customers at Logan, Utah; Pocatello, Idaho Falls and Boise, Idaho; Butte, Great Falls and Helena, Montana; Spokane, Washington; and Eugene and Portland, Oregon (R. I, 389). It would be a great advantage to this shipper if he could use the Ogden gateway over the Rio Grande (R. I, 390).

The witness stated further that he had transit privileges when he shipped over the Union Pacific out of Omaha, thence into the Northwest; that if he could ship Georgia marble through Grand Junction, Colo. (over the Rio Grande) with stopoff privileges he could handle about four cars a year that way; that, on his shipments from Georgia, practically every car contains marble stones which are reshipped to the Northwest and if he had transit privileges and through rates it would enable him to meet competition (R. I, 390–391). He further stated that his yard is the only one between Denver and Los Angeles and San Francisco, and that there are no manufacturers in the Northwest; that the

granite or marble from Georgia comes through in pool cars, to be finished by the various dealers in the West, and that the cars are stopped at a number of places for partial unloading; and that the nature of the business is such that the dealer has to handle about ten different materials and must ship in the pool cars for that reason (R. I, 392–393). There are dealers whom he cannot always supply, since the cars almost invariably contain some material for either Brigham or for customers at other points in Utah, or in Idaho or Montana. If possible, cars are shipped with some tonnage in them for Grand Junction, but the difficulty is that such cars must terminate on the Rio Grande, and this seldom can be done. Therefore, the only alternative is to ship to Grand Junction in less-than-carload lots, which is prohibitive (R. 392–396).

A retail dealer in monuments at Grand Junction, Colo., supported the testimony of the foregoing witness. He stated that he retails monuments in eastern Utah, western Colorado, and northwestern New Mexico and that it would be very beneficial to him to be able to get pool cars, which he is not now able to do; that he has to buy full carloads on certain items, which results in overstocking; that, if he could have pool car stock delivered, his inventory would be smaller and it would enable him to expand his market considerably (R. I, 398–399); that it fre-

quently happens that he must forego business because the wholesaler cannot readily sell him a part car (to stop in transit at Grand Junction to partially unload) since the cars contain tonnage for others north of Ogden. Such part-car shipments as he gets are included in cars which terminate on the Rio Grande, while if pool cars were operated it would enable him to sell in the Northwest area (R. I, 400). On cross-examination, he stated that he could not do business at a profit unless he could get the materials at a carload rate and that if he has to ship everything at a less-than-carload rate he would have to cease his business (R. I, 403–406).

3. As to the circuity of the Rio Grande's routes

In finding (Neb. R. 73) "that it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation" that the Union Pacific and its connecting lines establish through routes with the Rio Grande on specified commodities originating in the excluded northwest territory, the Commission directed that such routes run only to

> destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately

> north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas.

As a result, the through routes which the Commission ordered established will not apply on shipments from the excluded territory to points in Colorado east of and including the Colorado common points, Kansas (except Kansas City), Nebraska (except Omaha), North and South Dakota, Minnesota, Wisconsin, and those portions of Iowa and Illinois which lie north of the route of Union Pacific and the Chicago and North Western between Omaha and Chicago.

This ultimate finding was based primarily on differences in operating conditions over the Union Pacific routes and over the Rio Grande routes via Ogden. Thus, the Commission made the following findings in its report (Neb. R. 71–72):

> The differences in the distances between the Union Pacific routes through Wyoming, on the one hand, and the Rio Grande routes sought, on the other, using Boise, Idaho, as a representative point in the excluded territory, vary approximately from 95 miles or 11 percent to Denver, short-route distance 880 miles; 200 miles or 14 percent to Kansas City, 1,410 miles; 211 miles or 8 percent to New York, N. Y., 2,691 miles; 200 miles or 9 percent to Atlanta, Ga., 2,289 miles, to 33 or 35 miles,

or 2 percent, to New Orleans, and to Fort Worth and other points in the Southwest, with short-route distances varying from 1,612 miles at Oklahoma City to 2,282 miles at New Orleans. From most of the excluded territory to western trunk-line destinations north of the route of the Union Pacific and Chicago & North Western between Omaha and Chicago, and in the Dakotas, the short routes are in connection with the Northern Pacific, Great Northern, or Milwaukee, and to such destinations the Rio Grande routes sought via Ogden are longer generally by at least 33 percent, and range up to more than 50 percent, than the short routes. From many points in the excluded territory to points in Colorado east of and including the common points, Kansas west of points on the Missouri River, and Nebraska, except Omaha, the short-route distances are less than 1,000 miles. We are of the view that the differences in transportation conditions, by which is meant operating conditions and lengths of hauls, over the Union Pacific routes and over the Rio Grande routes via the Ogden gateway are substantial for hauls between the excluded territory, on the one hand, and points in Colorado east of and including the common points, Kansas west of points on the Missouri River, Nebraska, except Omaha, the Dakotas, Minnesota, Wisconsin, and Iowa and Illinois north of points on the route of the Union Pacific and the Chicago

& North Western extending between Omaha and Chicago, on the other hand, but that for hauls between points in the excluded territory and points in the United States east and south of the points and territory above described, the differences in the transportation conditions are, in general, spread over hauls of such great lengths that, considered as a whole, they become relatively insignificant. Thus, over these respective routes from and to the latter points the transportation conditions are substantially similar.

There was evidence that there is much greater curvature in the Rio Grande line than in that of the Union Pacific, and that the total rise and fall in feet on the Rio Grande is 66.3 per cent greater than that of the Union Pacific.

Extensive evidence as to the circuity of Rio Grande's routes was summarized by the Commission in the form of the following table showing representative destinations and distances from McCammon, Idaho, over routes using the Rio Grande from Ogden to Denver, as compared with distances over routes using the Union Pacific through Wyoming (Neb. R. 40):

From McCammon, Idaho to—	Via Union Pacific	Distance	Via Rio Grande	Distance	Difference	Circuity via Rio Grande
		Miles		*Miles*	*Miles*	*Percent*
Omaha, Nebr	(1)	1,036	(2)	1,255	219	21.1
Kansas City, Mo	(3)	1,153	(3)	1,352	199	17.2
Minneapolis, Minn	(3)	1,396	(3)	1,593	197	14.1
St. Louis, Mo	(3)	1,428	(3)	1,627	199	13.9
Chicago, Ill	(1)	1,524	(2)	1,735	211	13.8
Pittsburgh, Pa	(1)	1,991	(3)	2,203	212	10.7
Charleston, W. Va	(3)	2,018	(3)	2,218	200	10.0
Columbia, S. C	(3)	2,274	(3)	2,473	199	8.8
Baltimore, Md	(1)	2,319	(2)	2,521	202	8.7
Norfolk, Va	(3)	2,438	(3)	2,637	199	8.2
New York, N. Y	(1)	2,477	(2)	2,674	197	8.0
Tulsa, Okla	(4)	1,377	(5)	1,427	50	3.6
Dallas, Tex	(6)	1,456	(5)	1,489	33	2.3
Fort Smith, Ark	(4)	1,458	(5)	1,538	80	5.5
Memphis, Tenn	(3)	1,593	(5)	1,786	193	12.1
New Orleans, La	(6)	1,979	(5)	2,003	33	1.7
Atlanta, Ga	(3)	2,044	(5)	2,204	160	7.8
Savannah, Ga	(3)	2,327	(5)	2,486	159	6.8

[1] Union Pacific through Wyoming to Omaha.
[2] Union Pacific to Ogden, Rio Grande to Denver.
[3] Union Pacific through Wyoming to Kansas City.
[4] Union Pacific to Pacific Junction, Kans.
[5] Union Pacific to Ogden, Rio Grande to Pueblo.
[6] Union Pacific to Denver, Colorado & Southern to Sixala, N. Mex.

4. As to the rate situation at the Utah common points

The Commission found (Neb. R. 74):

> That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the Act.

The Bamberger Railroad is an electric railroad operating 36 miles between Ogden and Salt Lake City, points which are also served by the Union Pacific and the Rio Grande. Through routes and joint rates exist on traffic moving to and from points on the Bamberger and from and to

points in the excluded territory via the Bamberger, Ogden and the Union Pacific. However, through routes and joint rates do not exist on traffic moving between the same points over the Rio Grande (R. I, 117). The Commission stated that "it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande" (Neb. R. 73).

The decisions of the district courts

The Colorado Decision. The Rio Grande brought suit in the Colorado district court, seeking to set aside the Commission's order principally on the grounds that (1) the Commission erred in finding that through routes are not in existence via Ogden and the Rio Grande between points in the excluded territory, on the one hand, and the Colorado common points and points east, on the other, and (2) that the refusal of the Union Pacific and its connecting lines to establish competitive joint rates on traffic moving via Ogden and the Rio Grande constituted a violation of Section 3 (4) of the Act. The Colorado district court held that the through routes in question were already established (Col. R. 290, 292). Concluding that the Commission's holding to the contrary had prejudiced the Rio Grande's case (Col. R. 288), the Colorado court remanded to the Commission so that it might determine

whether broader relief should be granted (Col. R. 292).

The Nebraska Decision. The Union Pacific and its connecting lines brought suit in the Nebraska district court, seeking, on various grounds, to set aside the Commission's order insofar as it directed them to establish through routes and joint rates with the Rio Grande. The Nebraska court sustained the Commission's order establishing through routes and joint rates over the Rio Grande for particular commodities, in carloads, originating in the excluded territory "consigned to initial destination points on the Rio Grande west of Denver, Pueblo and Trinidad, which require in-transit privileges incident to reshipment to points east of Denver, Pueblo and Trinidad" (Neb. R. 167). The court also sustained the Commission's order as to shipments of marble and granite monuments from points in Vermont and Georgia to points in the excluded territory "which require unloading and in-transit privileges at points on the Rio Grande incident to the continuation of the shipment to the northwest [excluded] area" (*ibid.*). Thus, the Nebraska court modified the Commission's order insofar as the order required the establishment of through routes and joint rates on shipments of the specified commodities which do not require unloading or in-transit privileges on the Rio Grande.

The Nebraska court also sustained (Neb. R. 164) that portion of the Commission's order (Neb. R. 74) which found that—

> the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act.

SUMMARY OF ARGUMENT

I

The Commission found that through routes are not in existence over the Union Pacific and the Rio Grande railroads via the Odgen gateway, between points in the excluded northwest territory and eastern points. Therefore, it approached this case (in which the Rio Grande sought joint rates with the Union Pacific on all through traffic susceptible of movement via the gateway) as one requiring, initially, application of Section 15 (4)—a section which provides that where the establishment of an alternate through route will short haul one of the carriers directed to participate therein (the Union Pacific's situation here) the Commission must determine that certain conditions exist before it may prescribe the new

route. The Commission made ultimate findings meeting the requirements of Section 15 (4). Specifically, it determined that establishment of the prescribed through route for carriage of certain designated commodities was necessary to provide adequate and more economic transportation. The Commission then determined that the establishment of competitive joint rates for these designated commodities, moved over the prescribed alternate route, was necessary and desirable in the public interest—a determination meeting the requirements of Section 15 (3).

The Rio Grande challenged the Commission's order in the Colorado district court because of the Commission's failure to grant broader relief. That court concluded that the Commission had erred in failing to consider the Rio Grande's application free of the limitations imposed by Section 15 (4). In the court's view, a through route via the Ogden gateway already existed and Section 15 (4) was accordingly inapplicable.

A through route, in the statutory sense, does not exist merely because there is a physically practicable route. Carriers are obliged to provide interchange facilities with other lines and to forward and deliver traffic to such other lines. But compliance with this duty does not entail abandonment of a trunk line's right to maintain its long haul as against other carriers which would operate a bridge line and deprive the trunk

line of a portion of that haul. Congress has zealously sought, over the course of many years, to preserve and protect trunk lines against unnecessary short hauling. This is the function of Section 15(4). See *Thompson* v. *United States*, 343 U. S. 549, 555–560.

In short, a route which is physically open may be, for all practical purposes, closed by virtue of the existence of commercial barriers. The fact is that the trunk lines protect, and have already protected, their historic through routes by failing or refusing to join in the adoption of through or joint rates with the numerous lines which are, at one point or another, in a position to serve as bridge lines. Such refusal makes use of the alternate routes more costly and hence non-competitive.

The question decided by the Colorado court was not whether the Ogden gateway should be opened by action of the Commission (and, if so, to what extent). That court decided, in substance, that the Union Pacific, by voluntary action, had already waived the protection afforded by Congress in Section 15(4). We submit that such a waiver is not to be lightly implied. And it should not be implied unless there is a holding out by the trunk line, manifested by conduct which is unequivocal or by a course of business which is fairly representative, to participate in through service over the alternate route. This view finds support in the *Thompson* case, *supra*, though, concededly,

that case is distinguishable on its facts. See, also, *United States* v. *Great Northern R. Co.*, 343 U. S. 562, 574–575.

Special wartime routings and emergency diversions aside, more than 99 percent of the traffic which the Rio Grande seeks the opportunity to carry under joint rates competitive with the Union Pacific's rates has been heretofore moved via the Union Pacific's routes. This is so because even those shippers who would have good reason, all other things being equal, to prefer the Union Pacific-Rio Grande route for particular shipments (*e. g.*, because of the availability of a desired in-transit service at facilities located on the Rio Grande) are deterred by the fact that the combination of local rates which must be paid when the traffic is so routed is prohibitively high. A very small fraction of one percent has moved over the two-carrier route. The Union Pacific has never solicited such traffic (though it has accepted it on through bills pursuant to requests by shippers or other carriers). It appears, moreover, that some or all of this insignificant amount of traffic was routed over the Union Pacific-Rio Grande route because certain individual shippers erroneously assumed that the rates covering transportation via that route were the same as the rates via the Union Pacific routes.

The Commission found that these sporadic and isolated shipments were not sufficient to show a

holding out by the Union Pacific to join in a through route with the Rio Grande and that they were in no sense representative of the Union Pacific's course of business. A detailed examination of the subsidiary findings and evidence upon which this ultimate finding was rested shows that it has a substantial basis. The Colorado court accordingly erred in setting this finding aside and in substituting its independent judgment.

II

In a suit, brought by the Union Pacific (grounded on the contention that the Rio Grande is not entitled to any relief), the Nebraska district court modified the Commission's order. We take issue with that modification insofar as it narrows the measure of relief granted by the Commission in relation to the carriage of designated agricultural commodities (fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs). In other respects, we do not challenge the decision.

The Commission's order directed, *inter alia*, the establishment of through routes and competitive joint rates for the eastbound carriage, via the Ogden gateway, of the above-named agricultural products. This was rested upon an ultimate finding that establishment of such routes and rates was "necessary and desirable in the public interest, in order to provide adequate and more economic transportation * * *."

The Commission's reason for granting the relief in question fall into two categories, the one having to do with in-transit privileges, the other with reconsignment privileges.

Shippers of the designated agricultural commodities are faced with the need of procuring various types of in-transit services (washing, sorting, processing, etc.) while their produce is en route to market. The privilege of stopping carloads in transit for the purpose of securing such services is afforded by the Rio Grande. Many classes of shippers having need for these services are prevented, however, from making use of the facilities and privileges which are available on the lines of the Rio Grande, because, in the absence of joint rates between that railroad and the Union Pacific, the commodities can subsequently be reshipped to eastern markets only at prohibitively high combination rates. Similarly, processors and dealers served only by the Rio Grande are prevented from participating in the marketing of such commodities.

There is further and distinct need on the part of the shipping public in connection with the marketing of the designated commodities. They are perishable or semi-perishable commodities. Moreover, the markets to which they are shipped are fluid, prices being subject to rapid fluctuation. Shippers and dealers customarily meet the special economic problems

incident to trading in these markets by taking advantage of the reconsignment privileges which the railroads widely extend. The ability of shippers and dealers to participate fully and effectively "in the widespread system developed for the marketing of such commodities", necessarily depends upon the availability of numerous and flexible routing arrangements. Thus, if there is a sudden need, because of a shift of market conditions, to reconsign a shipment which has reached a point at which combination rates, rather than joint rates, apply, it may be necessary to dispose of the produce at forced or distress prices. Reconsignment in this situation may be unavailing because the shipper will probably be unable to meet the competition, at other points, of those who have obtained the advantage of joint through rates. The Commission found that numerous shippers of agricultural commodities originating in the excluded northwest territory are being deprived of effective participation in the marketing system because of the absence of joint rates via the Union Pacific and the Rio Grande to markets beyond the Rio Grande—a lack which precludes their use of reconsignment privileges which the Rio Grande extends. In this respect, also, the Commission found that the Ogden gateway should be opened in the interest of providing adequate and economic transportation.

The Nebraska court held that the Commission might appropriately consider the shipping public's need for in-transit services in determining whether existing transportation is adequate and economic. However, the court ignored the important factor of reconsignment privileges. The modification which it effected by its order reflects its consideration of the one factor and its failure to consider the other. Thus, the court's order upheld through routes and joint rates on the agricultural commodities in question when routed from points in the northwest area to initial points of destination on the Rio Grande for the purpose of obtaining in-transit services at those points. But, under the decision, joint rates on these same commodities will not be available in other circumstances.

The Nebraska court thus held, correctly we believe, that the concepts of adequacy of transportation and economy of transportation embrace the needs of the shipping public, and that, given such needs, the Commission may open up an alternate route, even though the carrier which will be thereby short hauled performs an efficient service on its own line. *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588, 592–593. The court erred, however, in taking account of the needs of particular shippers for in-transit services while ignoring the no less pressing need of many shippers for reconsignment privileges from which

they are presently excluded by the lack of competitive rates. An examination of the Commission's subsidiary findings and of the evidence shows that this difference in treatment, on the part of the court, whether it was intentional or inadvertent, was unwarranted. The record demonstrates that both types of need exist and that the Commission's order, so far as it relates to the designated agricultural commodities, should not have been narrowed.

ARGUMENT

Introduction

A single order of the Interstate Commerce Commission is involved in these appeals. In its principal aspects, that order requires the Union Pacific and the Rio Grande railroads to establish through routes and joint rates for the carriage, between specified territories, of certain designated commodities (chiefly livestock and perishable agricultural products). The practical effect of the order is to establish rates for those commodities, when carried over the opened route, which will be competitive with the prevailing rates on such traffic when carried over the Union Pacific routes (*i. e.*, when carried without participation by the Rio Grande).

The order involved is narrower in scope than the relief sought by the Rio Grande, which had petitioned the Commission to establish joint com-

petitive rates on *all* commodities moving to and from the so-called excluded territory. It is broader than the Union Pacific desired, since it has been that carrier's position that the Commission lacked basis for prescribing through routes and joint rates with the Rio Grande in respect of *any* commodity.

Both carriers sought relief from the Commission's order, though in different forums. In the suit brought by the Rio Grande in Colorado, the district court held that the Commission had erred in concluding that through routes did not already exist. Holding further that this prejudiced the Rio Grande's case before the Commission, that court remanded to the Commission so that it might determine, "free of any of the limitations imposed by § 15 (4) with respect to establishing through routes" (Col. R. 294), whether the Rio Grande was entitled to the full relief which it had sought.

In the suit brought by the Union Pacific before the Nebraska district court, there was, of course, no challenge by the complainant to the Commission's determination that through routes did not already exist. The claim, rather, was that the evidence and findings did not meet the statutory criteria which must be satisfied before such routes and rates may be established by the Commission. The court found that the evidence and findings supported the Commission's order only in part, and it modified the order accordingly.

Since it was a premise of the Commission's order that through routes for the carriage of the commodities in question were not already in existence, we consider that issue first.

I. The Commission correctly held that through routes are not in existence over the Union Pacific-Rio Grande via the Ogden Gateway

A. The statutory criteria

The Commission held (Neb. R. 33) "that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic here concerned, and that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation."[7]

[7] It also stated, in similar vein (Neb. R. 29-30):

"The first question for our determination, therefore, is whether or not the present routes by way of the Ogden gateway constitute 'through routes' as that term is used in section 15 (3) and (4) of the act. As above stated and as testified by numerous shippers in this proceeding, the Ogden gateway routes are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable. Plainly, a finding that such routes should be opened to shippers on a commercial basis by establishing competitive joint rates would result in the establishment of such routes as effective through routes, a character which they do not now possess."

"Through routes," as used in the Interstate Commerce Act, is a term of art. While a through route presupposes physical interconnection between two carriers, the mere connection of two carriers does not show that a through route exists in the statutory sense. Indeed, it is plain that connecting carriers are not subject to the duty of forming through routes in any and all circumstances. *Thompson* v. *United States*, 343 U. S. 549, 553–558. Thus, Section 1 (4) of the Act significantly states that "It shall be the duty of every common carrier * * * to establish *reasonable* through routes with other such carriers * * *" (emphasis added). Carriers are also required to afford reasonable facilities "for the interchange of traffic" with connecting lines and "for the receiving, forwarding, and delivering" of traffic to those lines. Section 3 (4). The duty to interchange and forward, however, falls short of a duty to join in a through route.

The existence of a through route requires, in addition to physical interconnection, that "the participating carriers hold themselves out as offering through transportation service," *Thompson* v. *United States*, *supra*, at 557. Such a "holding out" is most readily and unequivocally manifested when two connecting carriers, by voluntary action, publish rates, whether they be joint rates or so-

called proportional rates,[9] which are less than the aggregate of their respective local rates.[9] It may also be clearly manifested by other conduct, such as open solicitation of through traffic to be carried over a particular route.

The many existing through routes in this country have been established largely by voluntary action of the carriers. See *Thompson*, *supra*, at 554. In the simplest situation, *e. g.*, where railroad A has trackage between points 1 and 2, and railroad B has trackage between points 2 and 3, the railroads invariably offer in unequivocal terms a through service between points 1 and 3. Quite frequently they publish a rate for such transportation which is lower than the aggregate of the local rates between points 1 and 2 and points 2 and 3.[10]

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[9] In *United States v. Great Northern R. Co.*, 343 U. S. 562, 566, n., the Court stated: "When a through rate consists of a combination of rates for intermediate distances, the rate for one segment of the shipment is referred to as a proportional rate where * * * that rate is lower than the local rate over that segment."

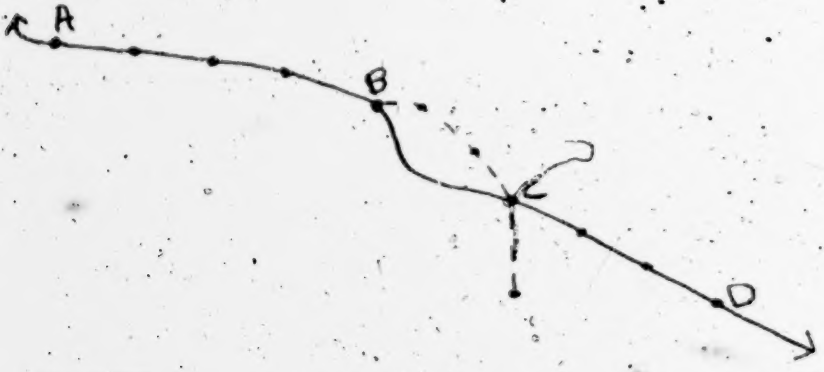
[9] Here, as we note *infra*, a shipper routing traffic over the Union Pacific-Rio Grande route would have been obliged to pay a combination rate consisting of the aggregate of the local rates, and such rate would have been far higher than the joint rate available over the Union Pacific routes.

[10] Of course, charging a combination of local rates would not disprove the existence of a through route. Existence of such a route might also be inferred from movement of a substantial amount of traffic on through bills of lading. Thus, this Court observed in *St. Louis Southwestern Ry. Co. v. United States*, 245 U. S. 136, 139:

"A 'through route' is an arrangement, express or implied,

The vexing problem—one which has occupied the attention of the Congress, the Commission, and the courts for a good many years—is presented by the situation where there are alternate physical avenues available over which traffic may be routed.

This situation may be illustrated by a simple diagram.



between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'through rate.' This 'through rate' is not necessarily a 'joint rate.' It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; as where the 'through route' is 'the sum of the locals' on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. * * *"

The Commission decision in *Through Routes and Through Rates*, 12 I. C. C. 163, 166–167, to which this Court referred in the *St. Louis Southwestern* decision, stated that the existence of a through route is a "question of fact" and that "such incidents as the billing, the transfer from one carrier to another, the collection and division of transportation charges * * * and other like incidents of the transaction may properly be depended upon for guidance as to the existence of a through route."

The carrier represented by the solid line, we shall suppose, is a trunk line operating between A and D and points beyond. It has a junction at B and C with a short line, represented by the broken line. Let us assume that the short line, quite naturally, would like to share in hauling, between points B and C, eastbound traffic moving on the trunk line from A toward D and westbound traffic moving on that line from D toward A. Let us assume further, however, that the trunk line, also quite naturally, wishes to avoid giving up a part of its long haul and that it quotes through rates for this traffic moved via its lines while refusing to establish competitive through or joint rates on such traffic moved via the short line. May the Commission, in such circumstances, compel establishment of a through route and competitive joint rates on such traffic moved via the short line's tracks?

On this point, Congress has spoken in Section 15 (3) and (4) (*infra*, pp. 91–94). Under Section 15 (3), Congress has granted the Commission the broad power to establish, "whenever deemed by it to be necessary or desirable in the public interest," through routes and joint rates. This power, however, is qualified by Section 15 (4).

The latter provision states in substance that a carrier shall not be compelled to participate in a through route where the effect will be to short

haul if,' unless (a) the existing route is unreasonably long (not the situation in the instant case) or (b) "the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation."[11]

In the instant case, the Commission found that, so far as transportation of the particular designated commodities was concerned, it was necessary and desirable in the public interest, in order to provide adequate and more economic transportation, to prescribe the establishment of through routes and competitive joint rates. The Colorado court held, however, that the Commission erred in considering Rio Grande's application in terms of ability to meet the criteria stated in Section 15 (4). It was that court's view that the Union Pacific, by voluntary action, had engaged in a course of conduct which evidenced consent to the creation of a through route with the Rio Grande and that accordingly the question

[11] Short-hauling, in the words of Section 15 (4), is to "require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route."

[12] Additional provisos in Section 15 (4) are not immediately pertinent. A brief history of the evolution of the so-called short-hauling provisions is found in *Thompson v. United States*, *supra*, at 554–557.

before the Commission should have been decided exclusively by reference to the criteria stated in Section 15 (3), free from the limitations imposed by Section 15 (4).

On this aspect of the case, the question may be restated as follows: What course of conduct sufficiently establishes that a carrier has consented to establishment of a through route? Or, otherwise phrased, when does a carrier waive the protection against short hauling which Congress has carefully written into Section 15 (4)?

Thompson v. United States, supra, was a case in which the trunk carrier quoted through rates on traffic originating on or destined for an intersecting short line when such points were not also served by the trunk line. The essential situation there presented may be stated in terms of the diagram appearing above. Let us suppose that the trunk line pictured in the diagram offered through service from A to B and thence, via the short line, to points on the short line falling short of and not including C. Such a holding-out, *Thompson* teaches, does not constitute an offer to provide through service via the short line as between points B and C.

In the instant case, unlike *Thompson*, *some* traffic (a small fraction of one per cent) actually moved via the Rio Grande between the equivalents of points B and C (that is, moved between excluded territory and common points or be-

yond). This led the Colorado district court to conclude that a through route was already open. But this Court, in *Thompson*, did not hold that if some traffic had moved between B and C it would necessarily follow, irrespective of the amount of the traffic and of the circumstances under which the transportation was performed, that a through route was open—a question which it had no occasion to reach. The Court did indicate, quite clearly we believe, that whether a carrier had acted in such a manner as to hold out through service would depend upon whether the carrier's "course of business" (343 U. S. at 557) negatived or affirmed a readiness to join in through service with the other carrier concerned. The Court's opinion also reflects approval of the Commission's expressed view that a determination whether the routing of shipments over lines of two connecting carriers manifests a holding out to perform through service depends upon an evaluation of all the incidents of the transportation (*ibid.*).[23]

The difficulty in stating categorically whether a through route exists in a particular case inheres, then, in this circumstance: a route physically

[23] In *Thompson*, p. 557, n., the Court also referred to *Beaman Elevator Co.* v. *Chicago & N. W. Ry. Co.*, 155 I. C. C. 313, as a case in which "the Commission held that proof of one shipment on a through bill of lading over a certain route was not sufficient to show the existence of a through route because that one shipment was not representative of the carriers' course of business."

open and available for the performance of a through service may be, practically speaking, closed (or virtually closed) by reason of commercial barriers. There are, for example, literally countless routes by which an ingenious shipper might specify the carriage of a carload of goods from New York to Chicago; provided, of course, he were willing to pay an aggregate of rates far higher than the through rate he might enjoy by accepting carriage over an ordinary, established through route. To establish that some shipments have moved between New York and Chicago over many of these variant, physically open routes would not establish that those routes are, in any meaningful sense, open through routes. The simple truth of the matter is that the trunk lines protect, and have always protected, their historic through routes by failing or refusing to join in the adoption of through or joint rates with the numerous lines which are, at one point or another, in a position to serve as bridge lines and to deprive the trunk carriers of their long hauls.[7]

[7] The views expressed in this paragraph are not in conflict, as the district court apparently believed (4 Col. R. 291), with *Virginian R. Co. v. United States*, 272 U. S. 658. There it was held that a through route existed despite the fact that it was commercially closed to some of the lines located in the origin territory, but only because the route was open to numerous other lines similarly situated. See the reference to the *Virginian* case in *Thompson v. United States*, *supra*, at 560, n.

The Commission's view, as expressed in its report (Neb. R. 32), is that sporadic and isolated shipments which take place over a route despite the existence of commercial barriers—shipments which occur for special reasons and in exceptional circumstances, such as ignorance or inadvertence, or unusual and transitory needs, on the part of a few individual shippers who specify abnormal routing—do not show, in and of themselves, that a through route is open. The Commission must consider the totality of circumstances in order to determine what is truly representative of the carriers' course of business. It is also the Commission's view that if a trunk line opens a route for carriage of a particular commodity by quoting a through rate on that commodity in recognition of the fact that special needs of a particular class of shippers justify abnormal routing of that particular commodity, it does not follow that there is an existing through route open for carriage of other commodities as to which the carrier does not purport to make through service available.[15]

These views find full support in the statutory scheme, for to hold otherwise would necessarily

[15] As noted, *infra*, the Union Pacific voluntarily quotes through rates with the Rio Grande on sheep and goats. Note, also, that the Commission has, on various occasions, prescribed through routes on a single commodity without opening those routes to all commodities. See, *e. g., D. A. Stickell & Sons, Inc.* v. *Alton R. Co.*, 255 I. C. C. 333; *Adriance Irvain Co.* v. *Ann Arbor R. Co.*, 276 I. C. C. 334.

tend to undermine the protection which Congress has so zealously sought to preserve for a carrier's long hauls. See *Thompson, supra*, pp. 554–557. Moreover, as this Court emphasized in *United States* v. *Great Northern R. Co.*, 343 U. S. 562, the Commission's power to alter the patterns of traffic and to divert the flow of traffic from one route to an alternate physical route (by means of prescribing through routes and joint rates) is more circumscribed than its power to divert revenues (by means of prescribing joint rates and divisions thereof) as between two carriers which already participate in a through route.[16]

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[16] The *Great Northern* case turned on a proviso which appears in Section 15 (4) (*infra*, p. 93) and reads as follows:

"No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

This language, the Court held, did not bar the Commission, in a case involving two carriers (one a feeder and the other a trunk line) which had an existing through route, from prescribing joint rates and divisions thereof for the purpose of providing financial assistance to the feeder line. Had no through route existed, however, the Commission could not have prescribed such a route with a view to accomplishing that purpose. The Court observed that "[i]t is one form of regulation to redistribute revenues between connecting carriers by determining divisions of revenues received on existing through routes. The economic ramifications are quite different if the Commission establishes through routes which divert traffic to the lines of a financially weak carrier." 343 U. S. at 574.

It follows that when the Commission proposes, by rate-making, to divert substantial traffic from the route over which it normally moves to a route over which it does not ordinarily flow, it must find, preliminarily, one of two things: it must find, on the basis of clear and persuasive evidence, that a through route already exists; or it must find, if it concludes that there is no existing through route, that the conditions specified in Section 15 (4) are satisfied and that such a route may be properly prescribed. It may not lightly set aside the protection provided trunk carriers by Section 15 (4). *Great Northern, supra,* at 574–575.

With these criteria in mind, we turn to the question whether the Commission, on the particular facts and findings in this case, properly concluded that a through route was not already open and that Section 15 (4) accordingly applied. We add only that the Commission's judgment on that question, largely factual in nature, is plainly entitled to great weight and should not be disturbed unless found to be arbitrary. Cf. *Board of Trade* v. *United States,* 314 U. S. 534, 546–548.

B. The application of the statutory criteria to the facts of this case

In the instant case, the Commission held that the existence of through routes was not established by proof of the following: (1) 37 eastbound carloads of commercial shipments, in 1948, from the excluded territory, via Ogden and the

Rio Grande, to points in Utah and Colorado served by both the Union Pacific and the Rio Grande, and 18 westbound carloads of commercial shipments, in 1948, from points east of Colorado, via the Rio Grande and Ogden, to the excluded territory; (2) the Rio Grande's diversion of freight traffic from regular through routes in which it participated, to the Union Pacific; via Ogden or Salt Lake City, pursuant to service orders of the Commission issued during World War II; (3) World War II movements of troops and military supplies from the east and south to destinations in the northwest (excluded) area via Rio Grande-Ogden-Union Pacific; or (4) temporary, emergency diversions, because of snow conditions, from the Union Pacific to the Rio Grande, via the latter's Denver and Utah gateways, of traffic to and from the excluded territory.

During the representative year 1948, only a total of 55 carloads of commercial shipments moved eastbound and westbound at combination rates, over the Rio Grande, to or from points in the excluded territory, on the one hand, and the Utah or Colorado common points (or beyond), on the other. There is no evidence that any one of these shipments via the Rio Grande was solicited for movement over the Rio Grande by the Union Pacific or any of the connecting carriers with which it maintains through routes and joint rates. To the contrary, there is substantial evi-

dence that all or some of these shipments via the Rio Grande, at combination rates higher than the joint rates applicable via the Union Pacific, were so routed over the Rio Grande through the ignorance or inadvertence of shippers or originating carriers (Statement, *supra*, pp. 14–15). Obviously, shipments routed via the Rio Grande through ignorance or mistake by shippers or originating carriers do not constitute a "holding out" by the Union Pacific of a through transportation service with the Rio Grande. The routing of these 55 carload shipments via the Rio Grande is not to be regarded as a "course of business" on the part of Union Pacific, since, as the Commission noted (Neb. R. 32), these isolated shipments must be "compared with many thousands in both directions in the same year [1948] from and to the same points at the joint rates over the Union Pacific routes."

Such isolated commercial shipments are in the same category as the isolated shipment which, in *Beaman Elevator Co.* v. *Chicago & N. W. Ry. Co.*, 155 I. C. C. 313, was held to be insufficient proof of the existence of a through route. This principle of *de minimis*, in the determination of the existence of a through route apparently was approved by this Court in the *Thompson* case. Its application by the Commission to the facts of this case is reasonable.

During World War II, substantial shipments from points in the south and east were initially

routed to points in the northwest (excluded) territory via Rio Grande-Ogden and carriers other than the Union Pacific (such as the Southern Pacific). Pursuant to wartime service orders of the Interstate Commerce Commission and the Office of Defense Transportation, Rio Grande diverted many of such shipments to the Union Pacific at Salt Lake City or Ogden. These shipments were diverted by Rio Grande and were accepted by Union Pacific under compulsion of law. They do not represent an agreement between carriers for the establishment of through routes, as contemplated by Section 1 (14) of the Interstate Commerce Act. Similarly, the mandatory diversion or interchange of such shipments did not manifest any "holding out" or "course of business" by the Union Pacific to maintain through routes with the Rio Grande via Ogden. As the Commission concluded, such interchanges under governmental compulsion "show only that the Rio Grande routes were physically practicable" (Neb. R. 32), and have no bearing, under the *Thompson* case, on whether "through routes" are in existence.

No greater significance attaches to the initial routing and movement via Rio Grande-Ogden-Union Pacific of mixed trains of troops and military supplies from the south and east to points in the excluded area. These were wartime emergency movements, the routing of which was actually beyond the control of either carrier.

In February 1949, snow conditions on Union Pacific's main line through Wyoming forced it to divert to the Rio Grande, through Ogden on the west and Denver on the east, freight and passenger traffic from and to the excluded territory. However, it is clear that such diversion by the Union Pacific, and the acceptance and delivery of such diverted traffic by the Rio Grande, represented no more than the cooperation in emergencies which is happily commonplace in American transportation. Moreover, it was done under the actual or potential compulsion of the Commission's emergency powers under Section 1 (15) and (16).

We submit that the Colorado district court erred in finding, on the basis of the isolated or emergency shipments discussed above, a "continuous use of the Rio Grande route in the movement of traffic to and from the closed door area at through combination rates, without objection of the Union Pacific or participating railroads, * * * although the volume of traffic involved is comparatively small" (Col. R. 288). In arriving at this conclusion, the district court relied upon statements of Union Pacific representatives that shippers had the right to specify routing via the Rio Grande at combination rates to and from the excluded area. From this, the district court concluded that through routes must be in existence, on the theory that under Section 15 (8) of the Act a shipper

can specify routing only over an existing through route (Col. R. 288).

We believe that the district court's analysis overlooks economic realities. As the Commission found (Neb. R. 32), the Union Pacific's "whole course of conduct * * *, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic." Under these circumstances, Union Pacific's acceptance of isolated shipments on bills calling for routing over the Rio Grande hardly proves a "holding out" that it maintains through routes with Rio Grande. Moreover, there was evidence that such shipments via the Rio Grande were routed by shippers or originating carriers who did not know that joint rates did not apply on the Rio Grande (Statement, *supra*, pp. 14–15). There was no evidence that any of these shipments were made by a shipper who was aware that routing via Rio Grande would be at the higher combination rates.

Similarly, we think that the Colorado district court erroneously concluded from the fact that Union Pacific maintains through routes and rates with the Rio Grande on shipments of sheep and goats that through routes existed for commodities generally. The establishment, either voluntarily or pursuant to an order of the Commission, of a through route for a particular commodity, in recognition of a special need of shippers, does not

create a through route for commodities generally (see *supra*, p. 66). It is not a "holding out" to maintain through routes on all commodities or to all points. *Thompson* v. *United States, supra.*

The Colorado court also found proof of the existence of through routes in the wartime routings and diversions of traffic and in the emergency routings in February 1949. It reasoned that the fact that "the Commission did not invoke its authority under § 15 (4) of the Act to establish temporary through routes * * * indicates that the Commission assumed that through routes were already in existence" (Col. R. 289).

We submit that it should be completely immaterial whether the Commission established temporary through routes before it directed such wartime and emergency routings and reroutings of traffic. Union Pacific was doubtless aware that if it had raised the objection that neither regular nor temporary through routes were in existence, the Commission would have exercised quickly its powers under Section 15 (4) to establish temporary through routes. Clearly, Union Pacific incurred no legal disability because it cooperated in such wartime and emergency traffic movements.

In sum, the Commission was fully justified, on this record, in finding what every informed commercial shipper has long recognized: that the Ogden gateway is closed to traffic to and from so-called excluded territory.

II. The Nebraska district court erroneously narrowed the scope of relief granted by the Commission's order

A. The factors upon which the Commission relied were appropriate under the Act

The Commission's order (Neb. R. 21) opened up the Ogden gateway so as to permit the carriage at competitive joint rates, via the Union Pacific and the Rio Grande, of various designated commodities (ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs) moved, in carloads, from the excluded northwest territory to other specified territory.[17] This was based upon an ultimate

[17] The Commission's order did two other things as well: (1) it established a through route and joint rates, via the Union Pacific and the Rio Grande, for the carriage of granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area (Neb. R. 22); (2) it directed the Union Pacific to eliminate the discrimination, found violative of Section 3 (4) (*infra*, p. 91), which resulted from maintaining joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad, south of Ogden, on the other hand, while refusing to participate in like rates to and from *the same points* on the Rio Grande (Neb. R. 22).

The Nebraska district court sustained the portion of the order relating to granite and marble monuments as to shipments "which require unloading and in-transit privileges at points on the Rio Grande incident to the continuation of the shipment to the northwest area" (Neb. R. 167). This limitation is consistent with the Commission's rationale (Neb. R. 51–52), and we do not question its propriety.

In addition, the Nebraska court sustained, without any modification, the direction to the Union Pacific to cease dis-

finding, meeting the requirements of Section 15 (3) and (4), that establishment of such through routes and joint rates was "necessary and desirable in the public interest, in order to provide adequate and more economic transportation * * * " (Neb. R. 73). While various members of the Commission would have ordered relief on a broader scale, *i. e.*, would have included additional commodites, there was no disagreement on the proposition that need for relief in respect of the designated commodities was fully established by the record.

The Commission's reasons for granting the relief described in the preceding paragraph fall into two categories, the one having to do with transit privileges, the other with reconsignment privileges.

Shippers and dealers in the designated commodities have an important need for various types of in-transit services, *e. g.*, the grazing and fattening of livestock, and the preparation and processing of foodstuffs, en route to market. The privilege of stopping carloads in transit for the purpose of securing such services is afforded

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crimination as between the Rio Grande and the Bamberger in relation to points which they commonly serve. The Commission had found that there was no "important dissimilarity" which would justify the Union Pacific's distinction in treatment (Neb. R. 73), and the district court found that "[u]pon this record that factual conclusion may not be disturbed" (Neb. R. 165).

by the Rio Grande. Many classes of shippers having need for these services are prevented, however, from making use of the facilities and privileges which are available on the lines of the Rio Grande, because the absence of joint rates between that railroad and the Union Pacific makes the cost of routing the traffic over the Rio Grande prohibitive. As to such traffic, the Commission concluded, growers and shippers in the excluded territory are deprived of access to the markets represented by processors and dealers who are served only by the Rio Grande and who reship such commodities to points beyond the Rio Grande. Similarly, processors and dealers served only by the Rio Grande are deprived of an opportunity to handle agricultural products from the excluded territory. (Neb. R. 57–60, 70.)

The Commission also found that there is a further important need on the part of the shipping public in connection with the marketing of the designated agricultural commodities. The perishable or semi-perishable nature of these commodities, taken in conjunction with the fluidity of the markets to which they are transported, creates special economic problems which can only be satisfactorily resolved if there is great flexibility in the transportation system. Shippers and dealers customarily meet these economic problems by taking advantage of the reconsignment privileges which the railroads

generally extend. For example, a shipment of produce originating in the northwest may be marked at the outset for a destination in the east but reconsigned, one or more times, while en route, so as to reach a destination, perhaps ultimately in another section of the country, such as the southeast, where it may be disposed of with profit. The ability of shippers and dealers to participate effectively "in the widespread system developed for the marketing of such commodities" (Neb. R. 70)—a system "complex but efficient" (Neb. R. 69)—necessarily depends upon the availability of numerous routing arrangements. Thus, if there is a sudden economic need, because of a shift in supply and demand, to reconsign a shipment which has reached a point at which combination rates, rather than joint rates, apply, it may be necessary to dispose of the produce at forced or distress prices. Reconsignment in this situation may be of no avail because the shipper will probably be unable to meet the competition, at other points, of those who have obtained the advantage of joint through rates. The Commission concluded, in the instant case, that numerous shippers of perishable and semi-perishable commodities originating in the excluded northwest territory are being deprived of effective participation in the marketing system by virtue of the lack of joint rates as between the Union Pacific and the Rio Grande—a

lack which substantially precludes the use by these shippers of reconsignment privileges which the Rio Grande extends. In this respect, also, the Commission concluded that the Union Pacific routes, alone, are inadequate and that the interests of the economy would be served by opening up the Ogden gateway so as to permit participation by the Rio Grande.

The Nebraska district court found that the Commission might appropriately consider the shipping public's need for in-transit services in determining whether existing transportation was adequate and economic. The court's opinion, however, ignores the factor of reconsignment privileges. And the court stated in its findings of fact (Finding of Fact II, Neb. R. 166):

> The record supports the Commission's finding that present transportation service between the northwest area and points of initial destination on the Rio Grande (not also served by the Union Pacific between Ogden and Provo) is inadequate and also inefficient and uneconomical as to shipments of the commodities specified by the Commission from the northwest area to initial points of destination on the Rio Grande west of Denver, which require in-transit privileges enabling their reshipment on joint through rates to points of final destination east of Denver.[18]

[18] See, to similar effect, Conclusion of Law II, Neb. R. 167.

The Nebraska court has held, in short, that if one of the designated agricultural commodities is routed initially to a point on the Rio Grande, so that it may receive certain in-transit service (*e. g.*, processing) at that point, joint rates will apply. They will not apply, however, under the decision, to these same commodities routed over the Rio Grande in other circumstances. Thus, the Commission's order is considerably narrowed and the factor of reconsignment privileges, which was a basic feature of the Commission's rationale, finds no expression in the order as modified. We challenge the court's modification insofar as it bears on the establishment of through routes and joint rates for the designated agricultural commodities.

Before turning to a consideration of the Commission's subsidiary findings and the supporting evidence (which show, we believe, that the court was unwarranted in thus narrowing the order), we would emphasize that, from the standpoint of legal significance under the statute, no distinction can properly be drawn between the needs of shippers for in-transit services and their need for reconsignment privileges. Both, in our view, are factors which may be appropriately considered by the Commission in determining

whether existing transportation is adequate and economic.[19]

Congress has not limited the authority of the Commission to establish an alternate through route to the situation in which the existing route is unreasonably long, or to the situation in which the carrier which operates the existing route is providing inadequate or inefficient service on its own line. The Commission may also direct the establishment of the additional through route (and accompanying joint rates) because such additional route is needed, however efficiently the existing route may be run, to provide "adequate, and * * * more economic, transportation" (Section 15 (4)). Adequate transportation and economic transportation, in other words, are concepts which take into account the broad needs of the shipping public. Indeed, the concept of adequacy of transportation, this Court unanimously held in *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588, 592–593, "would seem to apply only to the interest of the shipping public," while the term

[19] We are not suggesting, of course, that the Commission may open up additional routes merely by indulging in the abstract hypothesis that, from the standpoint of flexibility, two are better than one, three are better than two, etc. We rely, as shown *infra*, upon specific findings that specific classes of shippers have substantial present needs for the alternate route which would be provided under the Commission's order.

economic transportation may embrace both shippers' and carriers' interests. Plainly, then, the Commission's recognition, in the instant case, that the Union Pacific provides good service on its own lines is no bar to an order which holds that the needs of certain classes of shippers justify, as to certain commodities, the establishment of an additional through route and of the accompanying joint rates which will make that route accessible.[20]

[20] In the preceding discussion, we have put aside, as we shall in the portion of the brief which follows, the Commission's finding that the failure of the Union Pacific to join in the establishment of joint rates with the Rio Grande has been unduly prejudicial of shippers and receivers of the designated commodities using the Rio Grande and unduly preferential of shippers and receivers using the Union Pacific routes, in violation of Section 3 (1) of the Act (*infra*, pp. 90–91). The district court held this ultimate finding legally insufficient because it was of the view that Section 3 (1) prohibits only preference and prejudice to persons or localities on the lines of the same carriers, and is not applicable if the persons or localities receiving the preference are served by a different carrier than those subject to prejudice. For the reasons summarized in our Jurisdictional Statement in No. 119, pp. 11–12, we believe that the court erred in this respect. However, we find that, in the context of the present case, the central findings which show that members of the shipping public have been prejudiced by inability to use the Rio Grande similarly show that the existing transportation is not adequate or economic. Thus, the result here appears to us to be the same whether the case is analyzed strictly in terms of Section 15 (3) and (4), or whether one looks also to Section 3 (1). For the sake of simplicity of presentation, we turn to an analysis of the facts in terms of Section 15 (3) and (4), stating, at the same time, our conviction that this Court should not approve the view expressed below by the Nebraska court as to the scope of Section 3 (1).

B. The Commission's findings and the evidence justify the through routes and joint rates which it prescribed for agricultural commodities

In directing the establishment of through routes and joint rates on particular commodities moving via the Rio Grande to and from the excluded territory, the Commission recognized specific transportation needs of producers, shippers, dealers, and processors of such commodities.

Livestock. The Commission's findings as to livestock originating in the excluded territory may be summarized as follows: livestock (sheep and cattle) produced in the excluded northwest area are considered desirable for feeding and breeding purposes; good pasture lands for grazing livestock are found in areas in Utah and Colorado served by the Rio Grande; persons in these areas engage in fattening livestock, move livestock to the feeding lots, exercise feeding in-transit privileges, and reship stock, on the balance of available joint rates, to other parts of the country; if feeders of livestock at points served only by the Rio Grande desire to buy for feeding purposes livestock produced in the excluded area, they can only move it to their feeding lots and thence to markets beyond the Rio Grande at combination rates higher than the joint rates available to feeders and buyers served by the Union Pacific; thus, the lack of through routes, with competitive joint rates applicable to such routes, for livestock moving from the excluded

territory via the Rio Grande to eastern markets deprives growers in the excluded northwest area of a market for livestock, and deprives feeders in Utah and Colorado of competitive access to feeding stock from the excluded area. The typical evidence set forth in the statement (*supra*, pp. 20–28) clearly supports these findings as summarized above.

Agricultural products (other than livestock). The Commission found, and the record shows, that fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs are produced in the excluded territory and marketed in other parts of the United States. The growers and shippers of these commodities need access to as many markets as possible. Processors and dealers in such commodities who are located on the Rio Grande find it impractical to receive such commodities for storage, packing and other in-transit services because such commodities can move from points in the excluded territory via Ogden to points served only by the Rrio Grande, and thence to markets east of the Rio Grande, only on combination rates. Such processors and dealers are thus at a competitive disadvantage *vis-a-vis* processors and dealers on the Union Pacific who can receive such commodities from the excluded territory and reship them, after in-transit processing, on joint rates. At the same time, growers in the excluded territory are denied

access to the marketing services and facilities served only by the Rio Grande, while the persons providing such facilities and services cannot participate in the handling of such commodities. (Statement, *supra*, pp. 28–36). Thus, it was shown that to make in-transit services on the Rio Grande practically available on such commodities, it is necessary to establish for them through routes via Ogden and the Rio Grande and joint rates applicable to such routes.

The Nebraska court sustained the Commission's findings as to the necessity for through routes and joint rates via Ogden or Salt Lake City and the Rio Grande so as to make in-transit privileges on the Rio Grande available to shippers and receivers of livestock and the other specified agricultural commodities. Accordingly, it held that the Commission could require the establishment of such through routes and joint rates for carload shipments of such commodities "originating in the northwest area, consigned to initial destination points on the Rio Grande west of Denver, Pueblo and Trinidad, *which require in-transit privileges incident to reshipment* to points east of Denver, Pueblo and Trinidad" (Neb. R. 167; emphasis added).

Since the evidence with respect to livestock showed only a need for through routes and joint rates in connection with the exercise of in-transit privileges on the Rio Grande, we do not contest

the Nebraska court's restriction of such routes and rates, in the case of livestock, to shipments requiring in-transit privileges on the Rio Grande. However, we contend that, as to the remaining agricultural commodities, the Nebraska court erred in confining the Commission's relief to shipments of such commodities which require in-transit privileges on the Rio Grande. The court rejected or overlooked the importance to shippers of the right to reconsign or divert such shipments while en route—a right which can be exercised usefully only to the extent that joint rates are available.

The Commission found that in the marketing of agricultural commodities (other than livestock) originating in the excluded territory, it is a common practice to reconsign or divert carload shipments while they are in transit as markets are found and sales are made. While such reconsignment privileges exist over most railroads, it is necessary for shippers to use routes over which joint rates apply so that such shipments may be diverted to the new destinations at joint rates rather than at higher combination rates. If the shipment has moved to a point from which its diversion to a new destination can be made only at a combination rate, it must often be sold at that point at a distress price. Such points are known as pocket markets. For example, all points on the Rio Grande are pocket markets

with respect to potatoes shipped on joint rates to such points via Ogden from points in the excluded territory; if a sale is lost upon arrival of a shipment at such a Rio Grande station, it can be reconsigned to a destination beyond Denver or Pueblo only at higher combination rates.

Again, there are substantial markets for Idaho fruits and vegetables in the Central, Southwestern and Southeastern states. The Commission found (Neb. R. 56–57) that

> Carloads moved over the Union Pacific to the Central States can be diverted to the Southeastern States at the joint through rates if they move east through Omaha, Kansas City, St. Louis, or Chicago, but if the cars are routed to points in the Southwest over the Union Pacific and connections through Denver they cannot be diverted to southeastern markets east of New Orleans at joint through rates. The southwestern markets are pocket markets in that respect. Idaho producers are in competition with shippers in other producing areas and find it difficult to compete on shipments routed over the Rio Grande via Ogden or Salt Lake City. One Idaho shipper has made few sales of potatoes in the Southwest in the last several years because of pocket markets there.

This condition arises from the fact that the Union Pacific maintains joint rates on such commodities moving from the excluded territory to the south-

eastern states only on shipments which utilize its long haul to Omaha or Kansas City. Shipments which move into the southwest points over the Union Pacific and its connections via Denver cannot be reconsigned or diverted to southeastern points except at higher combination rates. In that respect, as the Commission found, the "southwestern markets are pocket markets." (Statement, *supra*, pp. 32–33.)

If agricultural products could be consigned at joint rates from the excluded northwest area via Ogden and the Rio Grande to points in Oklahoma and Texas, subject to reconsignment at joint rates to southeastern points, broader and more flexible markets would be available to northwest growers and shippers.

It follows that for shippers of agricultural commodities originating in the excluded territory to be able to exercise reconsignment or diversion rights, there must be established for such commodities through routes and joint rates via the Rio Grande which are not restricted, as required by the decision below, to particular shipments which require in-transit services at points on the Rio Grande.

CONCLUSION

The judgment of the Colorado district court (Nos. 117, 118, 119) should be reversed.

The judgment of the Nebraska district court (Nos. 332, 333, 334) should be reversed insofar

as that judgment narrowed the scope of relief granted by the Commission's order in relation to the carriage, over the prescribed through routes and at the specified joint rates, of the following agricultural commodities: fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs. In other respects, the judgment should be affirmed.

Respectfully submitted.

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MARCH 1956.

APPENDIX

Pertinent Provisions of the Interstate Commerce Act

Sec. 1 (4). It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Sec. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, lo-

cality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 3 (4). All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

SEC. 15 (3). The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or

property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

SEC. 15 (4). In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would

make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

SEC. 15 (8). In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this part to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established, as

in this part provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the intitial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

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